No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DILLARD'S, INC.,

Petitioner,

v.

GERDA BYRD, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Which of the differing versions of the equitable tolling doctrine applied by the circuit courts of appeals to the limitations period for filing of a charge of discrimination under the federal Age Discrimination in Employment Act (ADEA) with the Equal Employment Opportunity Commission (EEOC) is the correct interpretation of the doctrine?

2. Whether the limitations period for filing a charge of discrimination under the ADEA is tolled as a matter of law until an aggrieved employee who believes discrimination has occurred gathers enough evidence to prove a prima facie case and to make an argument that the employer's stated reason is pretextual?

3. Whether the Eleventh Circuit's decision is in conflict with those circuits that hold that equitable tolling cannot be used to delay running of the limitations period until evidence develops to fit plaintiff's preferred method of proof?

4. Whether the Eleventh Circuit correctly decided that the limitations period for filing a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) under the ADEA is tolled as a matter of law until the aggrieved employee learns of the hiring of a substantially younger replacement?

5. Whether the Eleventh Circuit's interpretation of the equitable tolling doctrine conflicts with the standard announced by other circuits that equitable tolling does not bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Dillard's, Inc., a Delaware corporation. No publicly held company owns ten percent or more of the Petitioner.

Respondent is Gerda Byrd, an individual.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE APPROPRIATE STANDARD FOR EQUITABLE TOLLING	5
II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT AND PRECEDENT FROM OTHER CIRCUITS REGARDING THE KNOWLEDGE A CLAIMANT MUST POSSESS TO BEGIN THE RUNNING OF THE LIMITATIONS PERIOD	9
III. THE ELEVENTH CIRCUIT'S DECISION IS IN CONFLICT WITH OTHER CIRCUITS BECAUSE IT ALLOWS PLAINTIFFS TO WAIT TO FILE A CHARGE UNTIL THE EVIDENCE DEVELOPS TO FIT A PREFERRED METHOD OF PROOF	12

TABLE OF CONTENTS—Continued

Page

IV. THE ELEVENTH CIRCUIT'S DECISION TO GRANT BYRD A FULL 180 DAYS FROM THE DATE SHE LEARNED THE LAST EVIDENCE TO SUPPORT HER CLAIM CONFLICTS WITH OTHER CIRCUITS 14

CONCLUSION 18

TABLE OF AUTHORITIES

CASES — Page

U.S. Supreme Court Cases:

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 17

Burnett v. New York Central Railroad Co., 380 U.S. 424 (1965) 16

Delaware State College v. Ricks, 449 U.S. 250 (1980) 5

EEOC v. Shell Oil Co., 466 U.S. 54 (1984) 9-10

Electrical Workers v. Robbins & Myers, 429 U.S. 229 (1976) 7

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1991) 6

Kansas v. Colorado, 514 U.S. 673 (1995) 18

National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) 5, 8-9

United States v. Ibarra, 502 U.S. 1 (1991) 17

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 6

United States Courts of Appeal Cases:

Bell v. Fowler, 99 F.3d 262 (8th Cir. 1996) 6

Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990) ..... *passim*

Dring v. McDonnell Douglas Corp., 58 F.3d 1323 (8th Cir. 1995) 7, 12, 16

English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988) 7

Hill v. Georgia Power Co., 786 F.2d 1071 (11th Cir. 1986) 12

Johnson v. United States Postal Serv., 861 F.2d 1475 (10th Cir. 1988), *cert denied*, 493 U.S. 811 (1989) 7

TABLE OF AUTHORITIES—Continued

	Page
Kocian v. Getty Refining & Marketing Co., 707 F.2d 748 (3rd Cir. 1983), *cert. denied*, 464 U.S. 852 (1983)	8
Leong v. Potter, 347 F.3d 1117 (9th Cir. 2003)	12
Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179 (1st Cir. 1989)	7
Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990)	11
New Castle County v. Halliburton NVS Corp., 111 F.3d 1116 (3rd Cir. 1997)	15
Olson v. Mobil Oil Corp., 904 F.2d 198 (4th Cir. 1990)	10
Pacheco v. Rice, 966 F.2d 904 (5th Cir. 1992)	13
Phillips v. Heine, 984 F.2d 489 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 905 (1993)	15
Pruet Production Co. v. Ayles, 784 F.2d 1275 (5th Cir. 1986)	11
Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975)	7
Ross v. Buckeye Cellulose Corp., 980 F.2d 648 (11th Cir. 1993), *cert. denied*, 513 U.S. 814 (1994)	10
Santa Maria v. Pacific Bell, 202 F.3d 1170 (9th Cir. 2000)	7
Slaughter v. Allstate Ins. Co., 803 F.2d 857 (5th Cir. 1986)	11
Smith v. American President Lines, Ltd., 571 F.2d 102 (2nd Cir. 1978)	8
Socop-Gonzalez v. Immigration and Naturalization Service, 272 F.3d 1176 (9th Cir. 2000)	16
Stark v. Dynascan Corp., 902 F.2d 549 (7th Cir. 1990)	13
Stitt v. Williams, 919 F.2d 516 (9th Cir. 1990)	6

TABLE OF AUTHORITIES—Continued

	Page
McAllister v. FDIC, 87 F.3d 762 (5th Cir. 1996)	6
Sturniolo v. Sheafter, Eaton, Inc., 15 F.3d 1023 (11th Cir 1994)	11
Truitt v. County of Wayne, 148 F.3d 644 (6th Cir. 1998)	8
Thelen v. Marc's Big Boy Corp., 64 F.3d 264 (7th Cir. 1995)	10
Vaught v. R.R. Donnelley & Sons Co., 745 F.2d 407 (7th Cir. 1984)	11
Valenzuela v. Kraft, Inc., 801 F.2d 1170 (9th Cir. 1986), *amended by* 815 F.2d 570 (9th Cir. 1987)	17
Washington v. Washington Metro Area Transit Auth., 160 F.3d 750 (D.C. Cir. 1998), *cert. denied*, 527 U.S. 1038 (1999)	7
STATUTES	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	2
28 U.S.C. § 1343(a)(3)	2
28 U.S.C. § 1367(a)	2
29 U.S.C. § 626(d)	2

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dillard's, Inc., respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("the Eleventh Circuit").

OPINION BELOW

The initial opinion of the Eleventh Circuit, issued on April 28, 2004, is reported at 331 F.3d 1259 (11th Cir. 2003) and reproduced in Petitioner's Appendix (hereinafter "App.") at 1a-20a. The initial order denying rehearing *en banc* is reported at 2003 U.S. App. LEXIS 25458 (11th Cir. August 11, 2003) and is reproduced in App. at 31a-32a. As part of its initial opinion, the Eleventh Circuit certified a question to the Alabama Supreme Court regarding the statute of limitations applicable to claims under the Alabama Age Discrim-

ination in Employment Act. The Alabama Supreme Court answered that question by opinion dated April 2, 2004. After receiving the Alabama Supreme Court's answer, the Eleventh Circuit issued a second opinion dated April 28, 2004, which is reported at 368 F.3d 1278 (11th Cir. 2004) and is reproduced in App. at 21a-30a. The order denying Dillard's second petition for rehearing *en banc* was filed June 25, 2004 and is reproduced in App. at 33a-34a.

JURISDICTION

Judgment of the Eleventh Circuit was entered on April 28, 2004, and the order denying panel rehearing and denying rehearing *en banc* issued on June 25, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 626(d) provides, in pertinent part:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred;

STATEMENT OF THE CASE

The Proceedings Below

Plaintiff, Gerda Byrd, asserted claims in the district court for age discrimination under the Age Discrimination in Employment Act ("ADEA") and the Alabama Age Discrimination in Employment Act ("AADEA"), and a state law fraud claim. The district court had federal question subject matter jusridiction, pursuant to 28 U.S.C. § 1331 and § 1343(a)(3), and supplemental jurisdiction over the plaintiff's pendant state law claims pursuant to 28 U.S.C. § 1367(a). The district court granted summary judgment on

all claims asserted by Byrd and the other five plaintiffs. The district court found that Byrd's age discrimination claims were time-barred because she did not file her EEOC charge within the required 180-day period.[1] By opinion entered May 30, 2003, a panel of the Eleventh Circuit affirmed the dismissal of plaintiff's fraud claim, reversed the dismissal of the federal ADEA claim, and sent a certified question to the Alabama Supreme Court regarding the statute of limitations for the Alabama Age Discrimination in Employment Act. Once the Alabama Supreme Court answered the certified question, the Eleventh Circuit issued a decision again affirming the dismissal of plaintiff's fraud claim, but reversing the dismissal of the federal and state age claims and holding that both claims were saved by the doctrine of equitable tolling. Dillard's requested re-hearing *en banc* of both Eleventh Circuit Orders, and both requests were denied. The Eleventh Circuit entered its judgment on April 28, 2004. Dillard's last petition for rehearing was denied on June 25, 2004.

Statement of the Facts

Plaintiff, Gerda Byrd claims that Dillard's violated the Age Discrimination in Employment Act and the Alabama Age Discrimination in Employment Act when it eliminated her Assistant Area Sales Manager ("AASM") position.[2] In late April or early May 1999, Store Manager Scott Gallant told Byrd that her AASM position in the Tuscaloosa Dillard's was being eliminated due to poor store sales, and Byrd was offered a sales position at the cosmetics counter. Byrd refused to work at the cosmetics counter and asked Store Manager Gallant and District Manager Gary Wirth for a severance package in late April/early May 1999. On Friday, May 21, 1999, Byrd was informed that she was approved for severance, and her last day of employment with Dillard's was May 22, 1999.

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[1] Alabama is a non-deferral state.

[2] Byrd has since elected to pursue only the Federal ADEA claim.

Byrd suspected the elimination of her position was motivated by "age discrimination" and was aware of her rights under the ADEA no later than June 12, 1999. While she was still working at Dillard's, Byrd and co-workers discussed that older workers were treated less favorably than younger workers. She testified in her deposition: "[a] lot of old people were severanced, older people, and we were talking about it . . . we said it looks like all the older ones are getting the shaft in here."

Byrd testified that Assistant Store Manager Andy Poole told her on June 8, 1999, that Store Manager Gallant had instructed him to look for two candidates for AASM positions. This conversation allegedly took place only two weeks after Byrd left her position having been told that the store's sales would not support her AASM position. Byrd's personal notes, dated June 12, 1999, show her awareness of her possible claim:

> On Tuesday 6-8-99 Mr. Andy Poole told me at Chillys [sic] Restaurant that Mr. Gallant told him, they had to find two new AASM's.
>
> This happens after I was told, the store could not afford any AASM's, because they were not making their figures.
>
> **Seems to me, I was lied to!!! As soon as I find out there are two new AASM' in place I will file a lawsuit against Dillards. This lawsuit will be for Age Discrimination, and Wage discrimination.**

(emphasis added). Byrd alleges that she learned on November 1, 1999, that a twenty-eight year old female, Tiffany Winters, had been hired to fill Byrd's former AASM position.

Byrd filed her EEOC Charge alleging violation of the ADEA on February 24, 2000. Her charge was filed more than nine months after the elimination of her position in late April/early May 1999; more than eight months after her June

12, 1999, written statement of her intent to file a "lawsuit . . . for Age Discrimination;" and almost four months after Byrd learned of her replacement's hiring.

The Eleventh Circuit's Decision

The Eleventh Circuit reversed the district court's holding that Byrd's claims were time-barred. The court concluded that the limitations period should be equitably tolled until plaintiff gathered enough evidence to establish her preferred prima facie case and to allegedly prove that the employer's proffered reason for elimination of her position was pretextual. *Jones et al. v. Dillard's, Inc.*, 331 F.3d 1254, 1265-66 (11th Cir. 2003). The Eleventh Circuit panel concluded that Byrd did not have enough evidence to begin the running of the statute of limitations until Byrd learned on November 1, 1999, that a younger employee had replaced her. *Id.*, at 1267-68. The Eleventh Circuit allowed Byrd a full 180 days from the November 1 discovery and, therefore, held that her filing in February of 2000, four months after the discovery of her replacement, was timely.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE APPROPRIATE STANDARD FOR EQUITABLE TOLLING.

This Court has previously determined that the limitations period for discrimination claims begins to accrue when plaintiff is informed of the adverse employment action. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The more difficult question to resolve involves the proper standard for determining when equitable doctrines should delay the running of the limitations period. That question was raised by this Court in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), but that case "pre-

sent[ed] no occasion to resolve that issue." 536 U.S. at 115 n.7. This petition places that issue squarely before the Court.

The time limit for filing a charge of discrimination with the EEOC is considered analogous to a statute of limitations and "is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). The Circuit Courts of Appeals have applied a variety of differing standards to these equitable doctrines. Courts have repeatedly noted that the case law in this area is "confused and contradictory." *Stitt v. Williams*, 919 F.2d 516, 522 (9th Cir. 1990); *see also*, *Bell v. Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996)(noting that "[e]quitable estoppel and equitable tolling are two distinct concepts often blurred by inconsistent use of the terminology"); *McAllister v. FDIC*, 87 F.3d 762, 767 n.4 (5th Cir. 1996)("Several courts, including the Supreme Court in *Irwin* [*v. Dep't of Veterans Affairs*, 498 U.S. 89 (1991)], have used the terms 'equitable tolling and 'equitable estoppel' interchangeably.").

The concepts of equitable estoppel and equitable tolling are similar but distinct doctrines. Perhaps the best description of the distinction between the two doctrines comes from Judge Posner's opinion in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990). The *Cada* Court noted that equitable estoppel, which has also been referred to as fraudulent concealment, "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations," and that equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada*, 920 F.2d at 451.

The Fifth, Eighth, and Ninth Circuits essentially follow the same reasoning as that in *Cada* and hold that, under the equitable tolling doctrine, the limitations period will be tolled until facts which would support a charge of discrimination are

apparent or should be apparent to a person with a reasonably prudent regard for his rights, without regard to whether there is active misconduct by the employer. *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 931 (5th Cir. 1975), *cert. denied,* 435 U.S. 1010 (1978); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1328-29 (8th Cir. 1995); *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000).

The First Circuit, taking a self-described "'narrow view' of equitable exceptions," allows for equitable tolling only where the employer actively misleads the employee. *See Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 185 & n.5 (1st Cir. 1989)(distinguishing *Reeb* and holding that equitable tolling is inapplicable because the employer did not actively mislead the plaintiff). The Fourth, Tenth and D.C. Circuits also require that there be active deception by the employer to give rise to equitable tolling. *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987)("t]he doctrines of equitable tolling and equitable estoppel have a common origin; they are based primarily on the view that a defendant should not be permitted to escape liability by engaging in misconduct that prevents the plaintiff from filing his or her claim on time"), *cert. denied,* 486 U.S. 1044 (1988); *Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1481 (10th Cir. 1988)("in this circuit, a Title VII time limit will be tolled *only* if there has been 'active deception'")(emphasis in original), *cert denied*, 493 U.S. 811 (1989), *Washington v. Washington Metro Area Transit Auth.*, 160 F.3d 750, 752-53 (D.C. Cir. 1998) (rejecting equitable tolling argument where plaintiff failed to present any evidence of "affirmative misconduct" or "misleading" behavior by his employer), *cert. denied*, 527 U.S. 1038 (1999).

The Second and Third Circuits have followed the implication of language in this Court's opinion in *Electrical Workers v. Robbins & Myers*, 429 U.S. 229 (1976), to conclude that equitable tolling is appropriate only where the defendant

has actively misled the plaintiff respecting the cause of action, or when the plaintiff has in some extraordinary way been prevented from asserting his rights or has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *See Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2nd Cir. 1978); *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748, 753 (3rd Cir. 1983), *cert. denied*, 464 U.S. 852 (1983). The Sixth Circuit has created its own five factor test for determining whether equitable tolling is applicable: (1) lack of notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement for filing his claim. *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998).

The Eleventh Circuit's decision in this case purports to rely upon an application of the equitable tolling doctrine, but as with many other decisions on the issue, it mistakenly merges the concepts of equitable tolling and equitable estoppel by suggesting that tolling is appropriate because the defendant actively deceived Byrd by concealing its true motivations. *Jones*, 331 F.3d at 1264. This case represents the perfect opportunity for this Court to resolve the question previously raised in *Morgan* while at the same time deciding which of these four differing applications of the equitable tolling doctrine is correct so as to eliminate any further confusion or contradictions between the circuits.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT AND PRECEDENT FROM OTHER CIRCUITS REGARDING THE KNOWLEDGE A CLAIMANT MUST POSSESS TO BEGIN THE RUNNING OF THE LIMITATIONS PERIOD.

Another facet of the equitable tolling doctrine that has created a division among the circuit courts concerns the degree of evidence of discrimination a plaintiff may possess before the equitable tolling doctrine is rendered inapplicable. The requisite knowledge for filing an administrative charge is certainly far less than what is required to file a lawsuit.

> [A] charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit. The function of a Title VII charge, rather, is to place the EEOC on notice *that someone* (either a party claiming to be aggrieved or a Commissioner) *believes* that an employer has violated the title. The EEOC then undertakes an investigation into the complainant's allegations of discrimination.

EEOC v. Shell Oil Co., 466 U.S. 54, 68 (1984) (emphasis added).

This Court's holding in *EEOC v. Shell Oil* makes clear that the only evidence a person must possess to file a charge of discrimination is a "belief" that discrimination has occurred.

There is additional support for this principle in this Court's holding in *Morgan,* which implies that equitable tolling will become inapplicable once an employee believes he has been discriminated against. *National Railroad Passenger Corp., v. Morgan*, 536 U.S. 101, 115 n.7 (2002) (declining to reach the issue of equitable tolling for discrete acts of discrimination where there was a finding by the district court that "'Morgan *believed* that he was being discriminated against at the time that all of these acts occurred. . . .'") (emphasis added). Even

precedent from the Eleventh Circuit suggests that equitable tolling becomes inapplicable once an employee believes he has been discriminated against. *See Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 660 (11th Cir. 1993) (charging period might be tolled if, in the period prior to the 180 days before filing the EEOC charge, the plaintiffs "*had no reason to believe* that they were victims of unlawful discrimination.") (emphasis added), *cert. denied,* 513 U.S. 814 (1994).

A lessened evidentiary burden for the filing of an EEOC charge is appropriate because, unlike a lawsuit, the claimant has no duty to conduct a pre-filing investigation. *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 268 (7th Cir. 1995) ("A plaintiff has no duty of prefiling investigation for an administrative complaint."); *Olson v. Mobil Oil Corp.*, 904 F.2d 198, 202 (4th Cir. 1990) ("The function of a charge is to initiate the EEOC investigation, . . . of employer actions which the employee believes violated the ADEA. . . . It is not necessary to the filing of a charge that one possess a proven case.") (citations and internal quotations omitted).

Despite the clear language from this Court's holding in *EEOC v. Shell Oil*, the Eleventh Circuit has held that a belief of discrimination is not enough to render the doctrine of equitable tolling inapplicable. Instead, the Eleventh Circuit grafted evidentiary requirements analogous to summary judgment procedures onto the tolling doctrine, holding that the limitations period must be tolled until a claimant has: (1) evidence within her possession to support a prima facie case; and (2) evidence to prove that an employer's stated reason is pretextual. *Jones*, 331 F.3d 1265 (discussing elements of prima facie case and evidence which is "insufficient to establish pretext"). No authority is cited for the assumed proposition that the same evidentiary measurements for granting or denying a summary judgment motion in a lawsuit apply to a determination as to whether a claimant has sufficient information to file a charge of discrimination.

In direct conflict with the Eleventh Circuit's holding, other Circuits hold that a claimant need not even possess evidence sufficient to support a prima facie case at the charge-filing stage. *See Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir. 1986) (holding that the "showing required at the charge-filing stage is even more lenient" than is required to prove a prima facie case); *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 411-12 (7th Cir. 1984) ("Facts more than sufficient to state a prima facie case are adequate to support a charge of discrimination.") (citations and internal quotations omitted). The Eleventh Circuit suggests that the limitations period for filing a charge should be tolled until an employee uncovers "truly damning evidence" or the "surfacing of telltale evidence." *Jones*, 331 F.3d 1264. Such a holding is in direct conflict with the tolling practice applied in other circuits.

The opinion which the Eleventh Circuit follows, *Sturniolo v. Sheafter, Eaton, Inc.*, 15 F.3d 1023 (11th Cir 1994), erroneously relies on two summary judgment opinions—*Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1986) and *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990)—as support for its holding that the plaintiff did not have sufficient evidence to file a charge of age discrimination before learning of her younger replacement. While a "mere suspicion" or a "belief" will not provide a plaintiff with enough evidence to survive a summary judgment motion, precedent from this Court and other circuits makes clear that a "suspicion" or a "belief" of discrimination is all that is necessary to file an EEOC charge.

By applying the summary judgment evidentiary standard to the equitable tolling doctrine, the Eleventh Circuit mixed apples and oranges and has created a conflict between its holding and the prior holdings of this Court and other Circuit Courts of Appeal. This Court should take this opportunity to resolve the conflict between the circuits as to what quantum

of evidence is needed to render the equitable tolling doctrine inapplicable. Equity aids the vigilant, and there is no need to further extend a filing deadline for an administrative charge for a person who has already formed a belief that he or she has been discriminated against before the limitations period expired.

III. THE ELEVENTH CIRCUIT'S DECISION IS IN CONFLICT WITH OTHER CIRCUITS BECAUSE IT ALLOWS PLAINTIFFS TO WAIT TO FILE A CHARGE UNTIL THE EVIDENCE DEVELOPS TO FIT A PREFERRED METHOD OF PROOF.

The Eleventh Circuit's opinion is in conflict with those circuits that hold that the statute of limitations is tolled only until a reasonable person would have known there was a "*possible* violation of the age discrimination act." *Cada*, 920 F.2d at 451; *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995) (allowing invocation of equitable tolling when a reasonable person "would not be expected to know of the existence of a possible ADEA violation"); *Leong v. Potter*, 347 F.3d 1117 (9th Cir. 2003)(same). Instead, the Eleventh Circuit allowed Byrd to sit on her claim until evidence developed to fit her preferred prima facie case.

The Eleventh Circuit's decision will work an injustice to both employees and employers alike. For employers, the ruling does away with the certainty that the limitations period is intended to provide. *See Hill v. Georgia Power Co.*, 786 F.2d 1071, 1076 n.9 (11th Cir. 1986) ("Congress selected an abbreviated limitations period . . . to facilitate the twin goals of preventing stale claims and encouraging prompt resolution of employment disputes."). The Eleventh Circuit's opinion effectively destroys the purpose of the statute of limitations by allowing the limitations period to be indefinitely extended while an employee awaits the occurrence of some strand of

evidence that could be viewed as support for a preexisting belief of discrimination.

The Eleventh Circuit's opinion conflicts with the holdings of the Fifth and Seventh Circuits, which expressly state that an employee cannot wait to file an EEOC Charge until after the evidence develops to fit the plaintiff's preferred elements of a prima facie case. *See Stark v. Dynascan Corp.*, 902 F.2d 549, 552 (7th Cir. 1990) (refusing to toll the limitations period until plaintiff learned of younger replacement because "allowing plaintiffs to manipulate limitations periods by picking and choosing between different methods of prosecuting the same claim . . . would inject substantial uncertainty into the judicial system and frustrate the goal of encouraging the prompt resolution of disputes.") (internal quotations omitted); *Pacheco v. Rice*, 966 F.2d 904, 907 (5th Cir. 1992) (A plaintiff cannot wait to "discover instances of disparate treatment of other employees months or years after their discharge. It is to be expected that some relevant facts will come to light after the date of an employee's termination—one purpose of filing an administrative complaint is to uncover them.").

The Eleventh Circuit's holding also creates needless uncertainty for employees. Assume that all of the facts asserted by Byrd are true with one exception: the AASM hired to replace Byrd was the same age as Byrd. The later hiring of an individual the same age as Byrd should not preclude Byrd from filing a charge that her job had been eliminated months earlier due to an illegal age bias. What then becomes the starting point for the running of the statute of limitations? Clearly, the hiring of a worker the same age as Byrd would not be a triggering date. Would this Court follow the Eleventh Circuit's reasoning and hold that the limitations period is tolled until the next replacement is hired who happens to be substantially younger than Byrd (even if that hiring does not occur until months or years in the future)? If

so, then there is *no* statute of limitations for the filing of an EEOC Charge.

The petitioner submits that Byrd should have filed her charge within 180 days of when she first believed she was discriminated against. If an aggrieved employee follows the Eleventh Circuit's holding and waits for further evidence to support an already formed belief of discrimination, the employee risks losing her claim if the anticipated additional evidence never comes to fruition. The holding of other circuits requires that a charge be filed when one suspects that discrimination is a "possibility," not when one believes it is a certainty. By eliminating the necessity of absolute certainty, employees who believe they are victims of discrimination are free to proceed with the administrative process. The holding of the Eleventh Circuit in this case is not the prudent course and should be reversed.

It is clear that the limitations period began to run in this case, at latest, on June 12, 1999, when Byrd stated her belief that she had been discriminated against, noted her intent to file a lawsuit, and had evidence to suggest to her that the reason offered for the elimination of her position was a pretext for age discrimination. This Court should use this opportunity to provide a clear statement of the law on the doctrine of equitable tolling so that both employers and employees will understand when a given claim will be deemed time-barred.

IV. THE ELEVENTH CIRCUIT'S DECISION TO GRANT BYRD A FULL 180 DAYS FROM THE DATE SHE LEARNED THE LAST EVIDENCE TO SUPPORT HER CLAIM CONFLICTS WITH OTHER CIRCUITS.

Assuming equitable tolling applies in a given case, a conflict exists between the circuits as to how the tolling period is to be calculated. The Eleventh Circuit concluded

that equitable tolling automatically extends the limitations period for a full 180 days past the date Byrd discovered the identity of her alleged replacement, even though she discovered this information *more than three weeks before* the expiration of the 180 day period following cessation of Byrd's employment.[3] The Eleventh Circuit's analysis conflicts with the equitable tolling doctrine applied by other circuits where the plaintiff discovers the necessary information before the limitations period expires.

Excluding the decision of the Eleventh Circuit, there are two primary schools of thought among the circuits on how the doctrine is to be applied. The Seventh Circuit's Judge Posner penned the leading decision for the school of thought applying a "reasonable" time limit to any tolled period. The Seventh Circuit rejects the position assumed by the Eleventh Circuit, that tolling "bring[s] about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term." *Cada*, 920 F.2d at 452. Instead, *Cada* held that that the equitable tolling doctrine only suspends the limitations period for a *reasonable* period of time after the necessary information has been obtained. *Id.* at 452-453.

The D.C. Circuit, the Third Circuit, and the Eighth Circuit have all followed the equitable tolling rule espoused in *Cada*. *See Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993) (following *Cada* and holding that "[t]he purposes of the doctrine [of equitable tolling] are fully achieved if the court extends the time for filing by a reasonable period after the tolling circumstance is mended"), *cert. denied,* 510 U.S. 905 (1993); *New Castle County v. Halliburton NVS Corp.*, 111 F.3d 1116, 1126 n. 11 (3rd Cir. 1997) (noting the *Cada* rule

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[3] While the record is not clear regarding the date Byrd first learned that her job was being eliminated, she clearly was aware of this by May 22, 1999, when she resigned and accepted severance.

but not reaching the issue of what a reasonable period might be); *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1331 (8th Cir. 1995)(discussing *Cada* and rejecting plaintiff's claim that equitable tolling applied, where plaintiff learned information that "allowed him to tie everything together and form the belief that his termination was based on age discrimination" before the limitations period expired, but waited three months before filing a charge).

The Ninth Circuit has explicitly rejected the rationale of *Cada* and the cases which follow it. *See Socop-Gonzalez v. Immigration and Naturalization Service*, 272 F.3d 1176 (9th Cir. 2000). In *Socop-Gonzalez*, the Ninth Circuit held that equitable tolling should result in a calculation of days remaining for filing an action whereby the number of days which were tolled should be added back to the end of the limitations period and that, as long as the complaint is filed in that extended period, it is timely. The Ninth Circuit explicitly rejected Judge Posner's reasoning that if a reasonable period remained before the original limitations deadline after the tolling condition is eliminated, equity might not require that the period be extended even though a tolling condition had existed for a portion of the limitations period. *Id.* at 1195-96.

In reaching its conclusion, the Ninth Circuit concluded that *Cada* and its progeny are contrary to this Court's decision in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), which held that when an action under the Federal Employers' Liability Act is incorrectly filed in a state court that is not a proper venue, the limitations period is tolled for the period until the state court's dismissal becomes final. The Ninth Circuit asserts, without explanation, that *Burnett* "foreclose[s] the approach to tolling taken in . . . *Cada*." *Socop-Gonzalez*, 272 F.3d at 1196.

The Ninth Circuit appears to have misread the meaning of *Burnett*. When the *Burnett* court rejected a "reasonable time," it was referring to the determination of when the

limitations clock would *start* ticking after the tolling condition was eliminated. The *Cada* "reasonable period" refers instead to the period when the resumed limitations clock would finally *stop* ticking, after it had resumed.

Strangely, a panel of the Ninth Circuit has cited this Court's opinion in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 n.5 (1984), as espousing the use of a "reasonable time" tolling doctrine such as the one used in *Cada*. *See Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1175 n.5 (9th Cir. 1986), *amended by* 815 F.2d 570 (9th Cir. 1987). Furthermore, this Court has cited with approval to *Cada* and Judge Posner's discussion of the principles of equitable tolling at least once. *See United States v. Ibarra*, 502 U.S. 1, 4 n. 2 (1991).

The Seventh Circuit's discussion in *Cada* provides the most sound reasoning as to why the limitations period should only be extended for what the court determines is a reasonable period of time.

> [Equitable tolling] gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations. . . .
>
> In most cases in which equitable tolling is invoked, the statue of limitations has run *before* the plaintiff obtained information essential to deciding whether he had a claim. . . . When as here the necessary information is gathered after the claim arose but before the statute of limitations has run, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so. The presumption will be more easily rebuttable the nearer the date of obtaining the information is to the date at which the statutory period runs out. In this case the interval was eight months, huge in the circumstances. We hold that a plaintiff who invokes equitable tolling to suspend the statute of limi-

> tations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information.

Cada, 920 F.2d at 452-53 (emphasis in original).

Byrd did not file her charge until February 24, 2000. Byrd, who had already determined to sue Dillard's, admits in her charge that she learned of her alleged replacement "[o]n or about November 1, 1999. . ." Byrd offered no explanation as to why she could not have filed her charge on or before November 18, 1999 (180 days from her last day at work). If the equitable tolling doctrine is applicable, it should only extend the limitations period a reasonable amount of time.

"[E]quity aids the vigilant and not those who slumber on their rights." *Kansas v.* Colorado, 514 U.S. 673 (1995) (citations and internal quotations omitted). Equitable notions should not be used to extend a deadline when plaintiff has all the information needed to pursue her claims and a reasonable period of time still remains before the expiration of the limitations period.

CONCLUSION

In today's workplace, large and small employers alike implement employment decisions affecting workforces which are frequently located across state lines—and not surprisingly in different judicial circuits. Opportunities for administrative and judicial review of even the most run of the mill employment actions are myriad. In such an environment, the ability to bring reliable and relatively quick closure to most employment disputes is a necessity.

Unfortunately, the variation of equitable tolling espoused by the Eleventh Circuit in this case seriously undermines these principles of finality. Moreover, the confused state of the law on notions of equitable tolling and equitable estoppel has created unnecessary conflict and disagreement between

the circuits. In the present state of things, a determination of the timeliness of an employee's EEOC charge depends largely on the law of the circuit where the charge is pending. The statutory scheme for addressing employment disputes is uniform; the judicial interpretation of those statutes should be uniform as well. Rarely will this court be presented with a case presenting a clearer fact pattern or more concrete timeline in which to provide the much needed guidance these issues deserve. For the reasons set forth herein, the petition for certiorari should be granted.

Respectfully submitted,

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